

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HASSAB EL NABI, : Docket #21-cv-03768
Plaintiff, :
-against- :
TOCCO, et al, : New York, New York
February 9, 2023
Defendants.

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PROCEEDINGS BEFORE
THE HONORABLE JENNIFER E. WILLIS
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re-</u> <u>Direct</u>	<u>Re-</u> <u>Cross</u>
None				

E X H I B I T S

<u>Exhibit</u> <u>Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir</u> <u>Dire</u>
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THE DEPUTY CLERK: All rise. Judge Jennifer Willis is now presiding. Court is now in session.

THE COURT: You may be seated.

THE DEPUTY CLERK: Good morning, Your Honor.

THE COURT: Good morning.

THE DEPUTY CLERK: We're here for El Nabi v. City of New York, 21-cv-3768. I just ask that attorneys rise and state their name for the record.

MS. ABOUSHI: Morning, Your Honor. Tahanie Aboushi of the Aboushi Law Firm. I don't know if you need me to enter an appearance on behalf of anybody or just --

THE COURT: No --

MS. ABOUSHI: I'm here.

THE COURT: I think not.

MS. ABOUSHI: Okay. Thank you.

MR. HARVIS: Good morning, Your Honor. Gabriel Harvis of Elefterakis, Elefterakis & Panek.

MS. FETT: Good morning, Your Honor. Baree Fett from the same firm.

THE COURT: All right. Good morning to you all. So what we're here for is that original

1 counsel has entered a charging lien with respect to
2 the settlement that was reached on behalf of Mr. El
3 Nabi.

4 I guess I'll -- why don't I start by sort
5 of just making some factual determinations. There
6 had been some discussion in the letters about the
7 possibility that the original firm had been fired or
8 removed or replaced, whatever language we want to
9 use for cause, and that as a result of that would
10 not be entitled essentially to anything from the
11 settlement. And I had asked for some documents to
12 review in camera from that firm about their
13 communication with their former clients. And based
14 upon that review, I do not believe that they, in
15 fact, were terminated for cause. So I just wanted
16 to sort of make that determination up front.

17 Another, sort of, factual issue that I
18 wanted to spread of record is that in the letters,
19 there was some discussion about, I guess,
20 essentially the value added by each set of
21 attorneys. And it is certainly true that it is the
22 second counsel who was able to carry this case
23 through to settlement. But sort of factually, one
24 aspect of that that I did want to sort of put before
25 the parties is that it is true that the City went

1 from a no pay to a pay position under the
2 stewardship of second counsel. But when we came
3 in -- we had two settlement conferences and when we
4 came in for the first conference, the City was still
5 in a, I'll call it, minimal pay position. So they
6 had moved from there, we won't pay anything to were
7 willing to pay something, but it was sort of a they
8 were willing to make a minimal payment, a nominal
9 payment. There had been an expert that had been
10 retained by new counsel. However, the report,
11 preliminary report from that expert had been
12 provided to the City in such proximity to the
13 settlement conference that the City had not been
14 able at that time to look at that report, to grapple
15 with it, to take it up the chain of command. So it
16 had no effect at that initial conference on their
17 position because they hadn't been able to
18 incorporate that. And we adjourned the first
19 conference in part so that they could grapple with
20 that expert report. But without going into the
21 detail of my conversations in private session with
22 the City, what I can report is that it is not there
23 grappling with the expert reports that change their
24 position from sort of minimal or nominal pay to
25 where we in fact, it ended up in this case. That

1 was based on some investigation of witnesses and
2 officers and the like that the corporation counsel
3 attorney undertook. And the results of those
4 conversations, I don't want to say it had no effect,
5 so I don't want to say that. But the results of
6 those conversations in the main was what changed
7 their viewpoint on the case in terms of their
8 understanding of the facts of what happened or did
9 not happen and the lens into what a trial might look
10 like for the City.

11 So I don't want to overstate and say that
12 that expert report had -- did not become part of the
13 conversation, but certainly based on my private
14 sessions with the City, they're obviously not here
15 and they don't need to be here today, this is not
16 their issue, but even though we obviously did come
17 to a settlement and come to an agreement, I cannot
18 remember now which parts of what they told me they
19 said were all right to share and which parts
20 weren't. And so that's why I'm being a little vague
21 because they're not here and I don't want to even
22 after the facts that have breached any competences.
23 But I can certainly report based on those
24 conversations that there was independent
25 investigation that they undertook that was the main

1 driver behind taking them from a sort of nominal pay
2 position to the place where the case ended up.

3 So those are just sort of two factual
4 things that I think are part of the discussion. One
5 was original counsel terminated for cause. I do not
6 believe that they were, so that is my finding.
7 Number two there's obviously no way for any of us to
8 know entirely where a final number comes from and
9 all the things that went into that. So it's
10 certainly true that they went from no pay to a pay
11 position with new counsel, but the place where they
12 came into settlement discussions was quite a
13 different number than where the case ultimately
14 ended. And that I can absolutely represent based on
15 my conversations with the City were in the main due
16 to investigation that they undertook to speak to
17 various witnesses so that they would have a clearer
18 understanding of what in fact happened on the
19 street. And based on the results of that, that is
20 what drastically changed the position of where we
21 ended up in terms of the settlement. So that's sort
22 of not anything that any of the counsel here could
23 have known because there's some things that are
24 shared from one side to another but some things that
25 are happening in private session as one side or

1 another sort of moves and some of that might have
2 been shared the day of. Frankly, I can't remember
3 how much of it was shared but I definitely recall
4 that aspect of my conversation with corporation
5 counsel because it was a significant move on their
6 part and our discussions about what was causing that
7 move and why they should move further based upon
8 this new information they had learned.

9 So I wanted to provide that as sort of a
10 factual backdrop to the ultimate settlement because
11 I think it does bear on who's entitled to what.

12 Last thing I'll say and I'll turn to the
13 parties. I am not in a position to sort of
14 micromanage how the compensation for attorneys
15 should be dealt with. I obviously don't have a copy
16 of any contract that anyone had with Mr. El Nabi. I
17 don't know what -- I mean, how many hours first firm
18 put in versus second firm or anything like that.
19 But to the extent that this question of was the
20 first firm terminated for cause, which obviously
21 would affect the ability to recover at all, and then
22 sort of factually just to add to this piece about
23 what ultimately drove the number that was received,
24 again, in the main, I think that was that
25 independent investigation. So that's what I think I

1 can do. I don't think I would be in a position to
2 sort of say 65 -- I can't even, right, any kind of
3 percentage that just seems to be something that the
4 attorneys need to discuss. But it does seem to me
5 that the first firm based on not being fired for
6 cause is entitled to something based on their
7 hearing lien.

8 So that is sort of what I have done between
9 receiving your letters and appearing here today.
10 But I'll hear from second counsel first if there's
11 anything additional that you want to say.

12 MS. ABOUSHI: Thank you, Your Honor. I
13 don't think there's anything additional but more as
14 to what do you anticipate being the course for today
15 going forward from here?

16 THE COURT: It seems to me that based upon
17 my ruling that the first firm was not fired for
18 cause. Because, again, had they been, I don't think
19 that they recover with respect to the charging lien.
20 And so discussions -- typically discussions of this
21 type, who gets what percentage, are things that
22 there's sort of a meet and conferral amongst
23 counsel. But when you were operating with these
24 different views about either does the first firm get
25 nothing, essentially, or do they get something, I

1 don't think that those conversations -- I obviously
2 wasn't privy to those conversations, but I would
3 assume they didn't go very far. Because if the
4 perspective is you get nothing and the other
5 perspective is we get something, there's not a lot
6 of compromise between those two possessions. And
7 essentially what I'm saying is because they were not
8 fired for cause, they get something. The
9 determination of what that is to be, it seems to me
10 that that is a conversation which the lawyers should
11 have. And if, again, you're not able to reach some
12 kind of agreement then perhaps we might need to
13 delve further into well, here's what my contract was
14 with Mr. El Nabi, well, here's the hours that we
15 billed. But I would hope that I don't need to get
16 that granular into the situation. That would sort
17 of be highly unusual, and I'm certainly in no
18 position to do that right now because neither side
19 has -- side -- neither sets of lawyers have
20 submitted those sorts of documentations because I
21 don't think we were at that stage. So in
22 anticipation of this conference, I wanted to make
23 that in camera review. And I thought that there was
24 information that would be useful about how the
25 settlement sort of unfurled to make everyone aware

1 of that that could kind of inform the discussions.
2 But I'm not really sure that substantively there's a
3 lot more ground to cover right now. That's sort of
4 my perspective.

5 I'll turn to the first firm to sort of hear
6 from you. Perhaps you think differently, but I
7 don't think there's sort of more determinations that
8 I can make at this point with the information that I
9 have. I'd be making up something, like, 50/50. I'd
10 be making something up. That would be unwise to do
11 because I just am not in a position to make that
12 kind of determination. I think it'd be unwise to
13 even try to. So that's my perspective.

14 But again, I'll turn to the first firm to
15 see if you feel differently.

16 MR. HARVIS: Thank you so much, Your Honor.
17 I don't feel differently. I think -- I really
18 appreciate I think the approach of the Court is the
19 correct one. I think this further information which
20 we had some inkling of but it's very helpful, I
21 think that sets us up.

22 This is my view. That we should now confer
23 again between counsel now that we have the benefit
24 of this and we realize that it's unlikely to result
25 in a nothing for one party situation and maybe that

1 will lead to some productive conversations. We've
2 certainly been enjoying speaking to Ms. Aboushi
3 while we are waiting to see the Court. So it seems
4 like we're having a very nice working relationship.
5 So I'm happy to explore that.

6 What I would propose would be of some
7 reasonable period of time for us to do that. And
8 then I think that the possibility of motion practice
9 would be something that often causes the parties to
10 really kind of come to an agreement. So if we could
11 kind of contemplate that and then have that as on
12 the horizon and hopefully not reach that point,
13 that's to me what I think would make the most sense
14 from here.

15 THE COURT: So perhaps what we can do is
16 set a date for a status -- you're not parties -- a
17 status letter from both sets of counsel just saying
18 we've had conversations and nothing more to do here.
19 We've worked it out. Obviously, if some agreement
20 is -- if there is some resolution, the details of
21 that does not need to be put on the docket. It's
22 not even really case related.

23 MR. HARVIS: Right.

24 THE COURT: This is a side issue in terms
25 of the case, but just sort of letting me know it's

1 taken care of or it is not, and further Court
2 intervention is necessary. And if further Court
3 intervention is necessary, I think what that would
4 entail would be both when you sort of do the
5 research of the landscape on charging liens
6 there's -- it's very -- there's the yes, you get
7 something or no you don't sort of thing in terms of
8 has there been termination for cause. But beyond
9 that, it's not as if there's going to be a lot of
10 guidance. Oh, if one firm was on for -- make up
11 your number -- six months and another was on for a
12 year, it means it -- just doesn't because it's
13 extremely fact specific.

14 MR. HARVIS: Yes.

15 THE COURT: So I think what it would have
16 to sort of descend into would be, here's how long we
17 were on, here's how many man hours, woman hours went
18 into this thing, here's how much this, that and the
19 other, and then me sort of doing a thumb in the air
20 kind of thing to come up with something.

21 Again, if you all are not able to resolve
22 this and we sort of have to resort to that, we
23 could. But this is not the kind of area where there
24 is going to be much guidance in terms of sort of
25 precedent because it is going to be so fact specific

1 other than the legal determination I've already made
2 about for cause.

3 So I would say we give some date, perhaps a
4 month. I'll turn to you to see if that's enough for
5 joint status letter, either saying, it's taken care
6 of goodbye, everybody live the rest of your life, or
7 we need more intervention. But then we're
8 essentially talking about sort of a deep dive into
9 the records of x phone calls, x number of emails.

10 MR. HARVIS: Yes.

11 THE COURT: Who even knows what that would
12 look like. But if that's where this goes, that's
13 what that would have to look like, because there's
14 not going to be anything beyond the legal
15 determination I've already made to sort of give
16 guidance. And so then it's just going to be kind of
17 we put in this amount of work, I put in this amount
18 of work. Again, there is the, they were at a no
19 pay, and they moved to a willing to pay before they
20 had done this more deep dive in terms of the
21 investigation. And that certainly did happen with
22 new counsel. So I want to acknowledge that. Other
23 than sort of that fact, the rest of it is kind of
24 who put in how much time, and I don't know how much
25 real assistance, I can be there, but that's where

1 this would have to go if, after the status letter,
2 there has not been some agreement amongst the
3 parties.

4 I'll turn to new counsel. Do you think
5 that a month is sufficient? If you need more time,
6 that's certainly fine. So that you can discuss with
7 counsel, look at whatever you need to look at, they
8 can look at, share whatever needs to be shared. Do
9 you think a month is enough time, or do you think
10 more time is needed?

11 MS. ABOUSHI: I think that's more than
12 enough, Your Honor. We've actually done a lot of
13 the exchanging. We've had numerous settlement
14 discussions before reaching out to the Court, so
15 we'll probably pick up where we left off.

16 THE COURT: Okay. Mr. Davis, a month.

17 THE DEPUTY CLERK: Yes, Your Honor, March
18 13.

19 THE COURT: Okay. So March 13 will be the
20 date to submit that. And again, it doesn't need to
21 have any specifics other than, yes, it's resolved,
22 or no, it's not. Then you set up a briefing
23 schedule for sort of phase two. But you certainly
24 don't need to put any detail about what that
25 conversation entailed on the record.

1 MR. HARVIS: Sounds good.

2 THE COURT: All right. So if there's
3 nothing else, we'll be adjourned and have a good
4 rest of your day.

5 MR. HARVIS: Thank you so much, Your Honor.
6 Thank you.

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C E R T I F I C A T E

I, Marissa Mignano, certify that the foregoing transcript of proceedings in the case of HASSAB EL NABI v. TOCCO, ET AL., Docket #21-CV-03768, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Marissa Mignano
Marissa Mignano

Date: March 21, 2023